UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
UNITED STATES OF AMERICA,

Government,

-v-

REZA ZARRAB,

Defendant.
---X

DECISION & ORDER

15 Cr 867 (RMB)

USDC SDNY
DOCUMENT
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DOC #:
DATE FILED: 4/5/17

I. Background

The Court held a conference on April 4, 2017, after receiving a letter from the Government, dated March 27, 2017, requesting a (second) Curcio hearing in this case. According to the Government, a Curcio hearing is needed to examine whether there are conflicts of interest related to the addition to the defense team of former New York City Mayor Rudolph Giuliani (also former United States Attorney for the Southern District of New York), and former United States Attorney General Michael B. Mukasey (also former Chief Judge of the District Court for the Southern District of New York). The conflicts which the Government wishes to have the Court explore relate to the work of their law firms, i.e., the alleged legal representations by the law firms Greenberg Traurig (in the case of Mr. Giuliani) and Debevoise & Plimpton (in the case of Mr. Mukasey) of certain banks whose interests are or may be adverse to the interests of Defendant Reza Zarrab. The banks in question are Deutsche Bank, Bank of America, JP Morgan Chase, Citibank, HSBC, Standard Chartered, UBS, and Wells Fargo.

The Government also seeks to have explored at the Curcio hearing, Greenberg Traurig's status of "agent" to the Republic of Turkey.[1]

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[1] As discussed below (p. 9 infra), the defense agrees (consents) that a Curcio hearing is warranted. (See Defendant's Letter to Court, filed Mar. 31, 2017, at 2 ("[C]ounsel is prepared to

The defense letter response stated: "[U]nlike the attorneys associated with Kirkland & Ellis, no lawyers from Greenberg Traurig or Debevoise & Plimpton will have any involvement in the trial preparation or trial in this case and neither Mr. Giuliani nor Mr. Mukasey intends to file a notice of appearance before Your Honor. Their roles will not require any appearance in Court . . . ." (Defendant's Letter to Court, filed Mar. 27, 2017, at 2.)

The Government wrote in reply, asserting, among other things, that "[p]reparation for trial and participation at trial . . . are not the only stages of representation that implicate the defendant's right to conflict-free counsel. . . . In this case, the Government has been expressly advised that Mr. Giuliani and Mr. Mukasey have been retained by the defendant and are involved in, and will continue to be involved in, efforts to explore a potential disposition of the criminal charges in this matter. To the extent that the defendant relies on the advice and efforts of these attorneys, and to the extent that there exist potential conflicts of interest that could impair the

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consent to a limited Curcio hearing" as to "whether [Mr. Zarrab] understands [Mr. Giuliani's and Mr. Mukasey's] roles, understands that they represent banks that may be victims of the alleged Bank Fraud charged in the Indictment, and also understands that Mr. Giuliani's firm is a registered Agent of Turkey.").)

A Curcio hearing was held on November 30, 2016 (and continued on December 14, 2016 and January 5, 2017) because Kirkland & Ellis, the law firm of which co-defense counsel Paul Clement and Viet Dinh, among others, are members, also represent so-called "victim banks" (including many of the same banks that are said to be clients of Greenberg Traurig and Debevoise & Plimpton). The Court ruled on February 15, 2017 that "the conflicts . . . d[id] not appear . . . to require that Kirkland and Ellis be disqualified from representing Mr. Zarrab." (Decision & Order, filed Feb. 15, 2017, at 10.) In reaching this conclusion, "[t]he Court . . . determined that, while there [we]re several potential conflicts, there d[id] not appear to be an actual conflict." (Id. at 5.) The Court also ordered that "these conflict matters must be closely monitored, principally by the Defense. Counsel [we]re directed promptly to advise the Court of any change of circumstances which may result in actual or which may exacerbate potential conflict(s) of interest." (Id. at 10.)

defendant's right to conflict-free representation, Curcio proceedings are appropriate . . . ." (Government's Reply Letter to Court, filed Mar. 27, 2017, at 1-2.)[2]

The Court has made clear, and does so here, that nothing it may have said having to do with the Government's request for a Curcio hearing in any way is meant to suggest or imply that Mr. Zarrab is guilty of any of the crimes he is charged with in the Indictment. (See H'rg Tr., dated Apr. 4, 2017, at 5-6.) Mr. Zarrab is presumed to be innocent of those charges and that presumption applies unless and until he were to be found guilty in proceedings in this Court. In that connection, trial of these criminal charges will begin on August 21, 2017.

The Court also makes clear that nothing it says or does is intended to disparage esteemed counsel, including: Mr. Brafman and his team of co-counsel; the acting United States Attorney Joon Kim and his team; former United States Attorney Preet Bharara, during whose tenure the case was commenced; or Rudolph Giuliani and Michael Mukasey, who have served our City and Country over many years as dedicated public servants and attorneys.

II. Legal Standard

The trial court's primary obligation is to ensure that the defendant receives a fair trial. United States v. Jones, 381 F.3d 114, 121 (2d Cir. 2004). "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 160 (1988).

The Second Circuit Court of Appeals has "set[] out the analysis that a district court confronted with the specter of conflicts of interest must follow in order to determine whether the right of the defendant to counsel of his choosing should be honored in a particular case." United States v. Cain, 671 F.3d 271, 293 (2d Cir. 2012). "At the initial, 'inquiry' stage, the court must investigate the facts and details of the attorney's interests to determine whether the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict at all. In satisfying its inquiry obligation, the district court may rely on the representations of counsel as to his interest in the case and how any potential conflict might be cured." Id. at 293 (citations and internal quotation marks omitted).

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[2] The Court's March 28, 2017 scheduling Order also requested briefing from the parties (with authorities). See pp. 6-9 infra. (A copy of the Order is attached hereto as Exhibit A.)

"Where the court determines that an actual or potential conflict exists but that it would not fundamentally impair the lawyer's representation, the district court should address the defendant directly and determine whether he wishes to make a knowing and intentional waiver of his right to conflict-free counsel . . . ." Id.

"Finally, if the initial inquiry establishes that the conflict is such that no rational defendant would knowingly and intelligently desire the conflicted lawyer's representation, the district court must immediately disqualify him. No waiver of the conflict is possible and, therefore, no Curcio hearing is required." Id. at 293-94 (citations and internal quotation marks omitted). "The question of disqualification therefore implicates not only the Sixth Amendment right of the accused, but also the interests of the courts in preserving the integrity of the process and the government's interests in ensuring a just verdict and a fair trial." United States v. Locascio, 6 F.3d 924, 931 (2d Cir. 1993).

The inherent power of the district court includes the power to police the conduct of attorneys. See United States v. Seltzer, 227 F.3d 36, 42 (2d Cir. 2000). A district court may "satisfy itself . . . [of] the nature of the prior [or current] representation." United States v.

Grisanti, 1992 WL 281434, at *6 (W.D.N.Y. Apr. 14, 1992); see also United States v. Parker, 439 F.3d 81, 102 (2d Cir. 2006).

A court has authority to "order[] [parties] to submit their retainer agreements for the court's in camera review." Funke v. Life Fin. Corp., 2003 WL 21005246, at *1 (S.D.N.Y. Apr. 30, 2003); see also United States v. Capoccia, 578 F. App'x 47, 49 (2d Cir. 2014). Courts can "require[e] [a party] to produce . . . documents indicating the source of third-party payment of its legal fees." Alfadda v. Fenn, 1994 WL 577002, at *1 (S.D.N.Y. Oct. 19, 1994); see also In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena, 926 F.2d 1423, 1432-33 (5th Cir. 1991) (where District Court ordered defense counsel to submit third-party fee arrangement for in camera review).

"The Foreign Agents Registration Act . . . require[s] agents of foreign principals to register with the Secretary of State." Rabinowitz v. Kennedy, 376 U.S. 605, 608 (1964). It "was enacted . . . [t]o protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities." Meese v. Keene, 481 U.S. 465, 469 (1987). An "agent of a foreign principal" is defined as "any person who," among other things, "acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal." 22 U.S.C. § 611(c).

III. Analysis

The Court has a dual role in these proceedings. Its foremost responsibility is to ensure that Mr. Zarrab is treated fairly and impartially, and that he receives a fair trial on the merits of the case. See Jones, 381 F.3d at 121 ("[T]he trial court's primary obligation is to ensure that defendant receives a fair trial."). It is also the Court's responsibility is to ensure the integrity of these proceedings. See Wheat, 486 U.S. at 160 ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.").

In the Curcio context, the Court, as noted, is obligated to "investigate the facts and details of the attorney's interests to determine whether the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict at all" and, if a conflict exists but would not fundamentally impair the lawyer's representation, to "determine whether he wishes to make a knowing and intentional waiver of his right to conflict-free counsel in conformity with the procedures set out in Curcio." Cain, 671 F.3d at 293. "[I]f the initial inquiry establishes that the conflict is such that no rational defendant would knowingly and intelligently desire the conflicted lawyer's representation, the district court must immediately disqualify him." Id. at 293-94.

The Court intends to perform these Curcio duties here.

The Court's March 28, 2017 Order posed a series of specific Curcio-related questions to counsel. In his March 30, 2017 letter response to the Order, Mr. Brafman advised the Court that Messrs. Giuliani and Mukasey have, in fact, been retained by Mr. Zarrab as his counsel and that "[t]he engagement of Messrs. Giuliani and Mukasey relates to the [instant] prosecution." (Defendant's Letter to Court, dated Mar. 30, 2017, at 1.) The work they are doing for Mr. Zarrab, he said, is "ancillary" to the pretrial and trial proceedings occurring in this Court. (Id. at 2.) And, according to defense counsel, they have no intention of appearing in this Court, or otherwise participating in the trial. (Id. at 1-2.)[3] Significantly, Mr. Brafman also advised the Court in his March 30, 2017 submission that the work being undertaken by Messrs. Giuliani and Mukasey for Mr. Zarrab "may impact the prosecution."[4] (Defendant's Letter to the Court, dated March 30, 2017, at 1).

In response, the Government states in a March 31, 2017 letter submission that the Government "understand[s] that Mr. Giuliani and Mr. Mukasey traveled to Turkey some time shortly after February 24, 2017 . . . [and] met with Turkey's president, Recep Tayyip Erdoğan, to discuss potential ways to facilitate a resolution of the charges against the defendant in this case."

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[3] Defense counsel offers relatively little information about the scope of work that Messrs Giuliani and Mukasey are doing on Mr. Zarrab's behalf and contends that such work "is protected by both attorney/client and work product privileges." (Defendant's Letter to Court, filed Mar. 30, 2017, at 1.) The absence of such detail hampers the Court's ability to determine whether an actual or potential conflict exists.

Media accounts that the Court is aware of suggest that the Zarrab case has been discussed by Secretary of State Rex Tillerson with Turkish Foreign Minister Mevlut Cavusoglu on or about March 30, 2017, see Gardiner Harris, Tillerson's Praise for Turkey Is Greeted with List of Complaints, N.Y. Times, at A4 (Mar. 31, 2017); see also Josh Lederman, Messy Web of Ties, Some to Trump, in Turkish Mogul's Case, Chi. Trib., http://www.chicagotribune.com/news/nationworld/ct-trump-ties-turkish-mogul-20170403-story.html (Apr. 3, 2017); by former Vice President Joe Biden with Turkey's President Recep Tayyip Erdoğan last Fall at a UN conference, see Gregory Korte, Obama, Biden Try to Win Over Turkish Presidency, USA Today (Sept. 26, 2014), http://www.usatoday.com/story/theoval/2014/09/26/obama-erdogan-charm-offensive/16244155/; by former US Attorney General Loretta Lynch with her Turkish counterpart, Justice Minister Bekir Bozdag, on or about October 26, 2016, see Nicole Hong, Turkish Official Asked U.S. Attorney General to Release Reza Zarrab, Wall Street Journal Online (Nov. 16, 2016), https://www.wsj.com/articles/turkish-official-asked-u-s-attorney-general-to-release-reza-zarrab-1479255405; and by Messrs. Giuliani and Mukasey with President Erdoğan in February 2017, see WTVQ Admin, Giuliani Seeks 'Critical' Role in Turkish Man's Case (Mar. 31, 2017), http://www.wtvq.com/2017/03/31/giuliani-seeks-critical-role-in-turkish-mans-case/.

[4] Mr. Brafman also states that Messrs. Giuliani and Mukasey's representation "has not [impacted the prosecution], and whether it will is a matter of speculation." (Defendant's Letter to the Court, dated March 30, 2017, at 1).

(Government's Letter to Court, dated Mar. 31, 2017, at 2; see also Benjamin Weiser & William K. Rashbaum, Legal Team that Includes Giuliani Pushes for Deal, Just Not with Prosecutors, N.Y. Times, at A18 (Apr. 3, 2017).) "Mr. Giuliani called the [United States Attorney's] Office to inform it of the [impending] trip." (Government's Letter to Court, dated Mar. 31, 2017, at 2.) "Mr. Giuliani . . . and Mr. Mukasey had informed the Office of the Attorney General that they were taking this trip." (Id.) "During a meeting with the [United States Attorney's] Office on March 24, 2017 . . . , defense counsel . . . informed th[e] Office that Mr. Giuliani and Mr. Mukasey had [also] sought to meet [with] other officials in the U.S. government outside of th[e] [Southern District of New York United States Attorney's] Office to discuss a potential disposition of this case." (Id.)

The Government argues that "the Court is entitled to better understand [Mr. Giuliani's and Mr. Mukasey's] roles," and that a Curcio hearing is required "to ensure that Mr. Zarrab is fully aware of and waives any potential conflicts that Mr. Giuliani and Mr. Mukasey's representation presents." (Id.) The Government also points out that the "potential conflict is compounded by the fact . . . that Greenberg Traurig appears to be a registered agent of the Republic of Turkey" and that its "simultaneous representation of both [Mr. Zarrab and the Republic of Turkey] may impair Mr. Giuliani's effective representation of the defendant." (Id. at 3; see also Weiser & Rashbaum, Legal Team, supra ("[Acting United States Attorney] Kim's office noted that Mr. Giuliani's firm had served as a registered agent of Turkey. The prosecutors said that meant Greenberg Traurig appeared to be simultaneously representing Mr. Zarrab and the Turkish government . . . ."). See generally Ventimiglia v. United States, 242 F.2d 620, 624 (4th Cir. 1957) (the Supreme Court has "strictly constru[ed]" the Foreign Agents Registration Act (citing Viereck v. United States, 318 U.S. 236, 243 (1943))).)

The defense replies in a March 31, 2017 letter that "what Messrs. Giuliani and Mukasey are attempting to do in their efforts to assist the defendant[] . . . quite frankly is none of the Government's business and in any event is covered by the attorney-client privilege and/or constitutes privileged attorney work product." (Defendant's Letter to Court, dated Mar. 31, 2017, at 1.) At the same time, Mr. Brafman consents to participate in a Curcio hearing, i.e. "as to whether [the Defendant] understands [Messrs. Giuliani and Mukasey's] roles, understands that they represent banks that may be victims of the alleged Bank Fraud charged in the Indictment, and also understands that Mr. Giuliani's firm is a registered Agent of Turkey." (Id. at 2.)

Oral argument was presented by both sides on April 4, 2017. (See H'rg Tr., dated Apr. 4, 2017.)

It should be noted that, notwithstanding the hyperbole which principally has come from outside the courtroom, the case has progressed professionally and appropriately within the courtroom. There have been several extensively litigated motions, including motions, dated July 19, 2016, to dismiss the Indictment and to suppress statements. Following oral argument by counsel, the Court ruled with respect to the motion to dismiss that "the Indictment clearly set[] forth each of the elements of a Klein conspiracy," "a conspiracy to violate the [International Emergency Economic Powers Act] and the [Iranian Transactions and Sanctions Regulations]," "a conspiracy to commit bank fraud in violation of 18 U.S.C. § 1344," and "a conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(a)(2)(A)." (Decision & Order, filed Oct. 17, 2016, at 7, 13, 25, 33.) The motion to dismiss was denied as to each count of the Indictment. (Id.) Separately, the Court has granted the Defendant's application for a hearing on the motion to suppress. (The defense request for a Franks hearing is sub judice.)

IV. Conclusion & Order

Based upon the record herein, including the parties' written submissions and oral arguments, and bearing firmly in mind the Court's responsibilities to ensure that Mr. Zarrab is treated fairly and has (or knowingly waives) conflict-free counsel, and to safeguard and ensure the integrity of these proceedings, see Wheat, 486 U.S. at 160, the Court confirms that these matters are unquestionably the Court's "business." And, the Court orders and directs as follows:

1. The Court will conduct a Curcio hearing on April 24, 2017, beginning at 9:30 a.m.[5] The Government and the defense have acknowledged or agreed that a Curcio hearing is appropriate, and that the work of Messrs. Giuliani and Mukasey and their firms may impact the outcome of these criminal proceedings. (See Defendant's Letter to Court, dated Mar. 31, 2017, at 2.) It is incumbent upon the Court, among other things, to investigate any conflicts or potential conflicts and, thereafter, to determine whether Mr. Zarrab is fully aware of any (actual or potential) conflicts of interest which may exist as a result of Messrs. Giuliani and Mukasey's representation of him. See Cain, 671 F.3d at 293-94. The Court will also determine whether any conflicts are of such a nature as can be knowingly and voluntarily waived by Mr. Zarrab, and whether he, in fact, chooses to do so. See United States v. Lussier, 71 F.3d 456, 461 (2d Cir. 1995) ("[T]he court must follow the procedures set out in [Curcio] to secure a knowing, voluntary, and intelligent waiver from the defendant of his right to a non-conflicted attorney.").[6]

2. The alleged conflicts to be considered relate to: (a) Greenberg Traurig's and Debevoise & Plimpton's representation of "victim banks," and (b) Greenberg Traurig's status and work as agent of the Republic of Turkey. See United States v. Isaacson, 853 F. Supp. 83, 88 (E.D.N.Y. 1994).[7]

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[5] The earlier scheduled suppression hearing will take place on May 9, 2017 at 9:30 a.m. (or such other date convenient to the parties).

[6] The Court must immediately disqualify counsel if "no rational defendant would knowingly and intelligently desire the conflicted lawyer's representation." See Cain, 671 F.3d at 293-94.

3. Mr. Brafman is requested forthwith to meet and confer with Messrs. Giuliani and Mukasey and thereafter to submit to the Court by affidavit/affirmation, along with supporting exhibits, the information described below. Such affidavit(s) may be filed under seal and presented for the Court's in camera review, particularly if they contain privileged information. Such affidavit(s) shall be submitted to the Court on or before April 14, 2017 (noon) and shall include the following:

a. Description of the nature of the work and roles Messrs. Giuliani and Mukasey have been retained to perform and have performed for Mr. Zarrab, including copies of the retainer agreements, see Funke, 2003 WL 21005246, at *1;

b. Description of the representations of "victim banks" by Greenberg Traurig and Debevoise & Plimpton (including by whom) and measures taken by these law firms to separate those representations from the representation of Mr. Zarrab;

c. Description of the agency relationship (including when it began) between Greenberg Traurig and the Republic of Turkey, including any involvement by Mr. Giuliani in such work, and a copy of the agency and retainer agreements, see United States v. Christakis, 238 F.3d 1164, 1169 (9th Cir. 2001); and

d. The identity of any persons or parties paying Mr. Zarrab's legal fees and expenses, see Alfadda, 1994 WL 577002, at *1, if other than Mr. Zarrab.

[7] The Court reserves the right to inquire into other conflicts or potential conflicts which may arise or become apparent in the future.

4. On an ongoing basis, the parties are directed promptly to advise the Court if they are or become aware of other actual or potential conflicts of interest.

5. The parties shall meet and confer in good faith to develop a joint list of Curcio questions to be posed by the Court at the Curcio hearing. The list shall be submitted to the Court on or before April 18, 2017 (noon). If the parties do not agree on the questions to be posed, they may submit questions separately.

Dated: New York, New York
April 5, 2017

RMB

RICHARD M. BERMAN, U.S.D.J.

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
UNITED STATES OF AMERICA,
Government,

15 Cr 867 (RMB)

-against-

ORDER

REZA ZARRAB,
Defendant(s).
---X

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: ______
DATE FILED: 3/28/17

Richard M. Berman, U.S.D.J.:

The Court will hold a conference on Tuesday, April 4, 2017 at 9:00 am. In advance of the conference, the parties are requested to submit briefs of no more than 12 pages double spaced setting forth legal authorities on the following issues:

1- Whether Messrs. Giuliani and Mukasey and/or their law firms have been retained by, or on behalf of, Reza Zarrab as legal counsel or in some other capacity;

2- If so, explain whether such engagement(s) in any way relate to and/or may impact the prosecution of Mr. Zarrab for the crimes alleged in the Indictment;

3- Whether Messrs. Giuliani or Mukasey intend to or are required to file notices of appearance in this case;

4- Whether the roles of Messrs. Giuliani and Mukasey are legally distinguishable (for purposes of filing notices of appearance) from the role(s) of the eight defense attorneys who currently have notices of appearance on file (or the eight other defense counsel who have withdrawn from the case after filing such notices) and, if so, how are they different;

5- Whether a Curcio hearing, as requested by the Government, should be held.

The Defense brief is due by noon on Thursday, March 30, 2017; the Government's response is due by 4:00 pm on Friday, March 31, 2017; and any Defense reply is due by 10:00

am on Monday, April 3, 2017. (The Defense is requested to file first as they would appear to be most knowledgeable about Messrs. Giuliani's and Mukasey's roles.)

In connection with these proceedings, the Court advises the parties of its prior relationships to Messrs. Giuliani and Mukasey which are as follows:

1- The Court served on Mr. Giuliani's Mayoral transition team (1993). The Court was appointed to the New York State Family Court by Mayor Giuliani in 1995;

2- The Court served as a colleague with Mr. Mukasey on the Southern District New York bench from 1998 to 2006.

These prior relationships do not, in the Court's view, affect its ability to continue to be fair and impartial in this matter.

Dated: New York, New York
March 28, 2017

RMB

Hon. Richard M. Berman, U.S.D.J.